Supreme Court, U.S.
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No. 99-1483

IN THE

Supreme Court of the United States

PACIFIC MARITIME ASSOCIATION,
Petitioner,

v.

THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 68, an unincorporated association,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT

In 1997, Local 68 of the International Longshore and Warehouse Union (ILWU)—a public sector local labor union that exclusively represents port pilots employed by the City of Los Angeles—called a strike following unsuccessful negotiations with the City over a new collective bargaining agreement. Pet. App. 2a-3a.

In conjunction therewith, Local 68 placed picket lines around several Port of Los Angeles Terminals operated by private shipping and stevedoring companies. Local 68's picket lines were honored by those shipping and stevedoring companies' union employees. Pet. App. 2a-3a.

In response, the City of Los Angeles brought suit against Local 68 in the Superior Court of the State of California, County of Los Angeles, seeking injunctive relief and that court issued a temporary restraining order against Local 68's picketing. On the issuance of that order, Local 68 ceased its picketing and the employees of the private shipping and stevedoring companies returned to work. *Id.*

After the California state court had acted, the Pacific Maritime Association (PMA)—an association representing private shipping and stevedoring companies in collective bargaining—filed unfair labor practice charges with the National Labor Relations Board (NLRB) alleging that Local 68's picketing had violated § 8(b)(4) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(b)(4). Pet. App. 9a n. 4. The NLRB General Counsel dismissed these charges on the ground that the Board "did not have jurisdiction over Local 68 by reason of its representational status of public employees." *Id.*

PMA then filed a suit under § 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187, against Local 68, and

against the two local unions that represent the employees of the private shipping and stevedoring companies that operate the Port of Los Angeles Terminals. The PMA suit alleged that the locals had engaged in the unfair labor practice defined in NLRA § 8(b)(4). Pet. App. 3a. The District Court dismissed the claim against Local 68 on the ground that "a labor organization representing employees of public sector employers does not fall within the scope of Section 8(b)(4) of the NLRA." *Id.* Finding that the "judgment dismissing Defendant Local 68 is separate and distinct from the issues remaining as to the other Defendants, ILWU Local 13 and Local 63," the District Court granted PMA's motion to certify that judgment for immediate appeal. *Id.* at 17a. On appeal, the Ninth Circuit affirmed the District Court's judgment. *Id.* at 11a.

ARGUMENT

The decision below is entirely correct. Indeed, as the Court of Appeals stressed, that decision is dictated by the plain language of the Labor Management Relations Act/National Labor Relations Act secondary boycott provisions and by two decisions of this Court construing that language—*Railroad Trainmen v. Terminal Co.*, 394 U.S. 369 (1969) and *Burlington Northern R. Co. v. Maintenance Employees*, 481 U.S. 429 (1987)—and is in accord with the National Labor Relations Board's construction of those provisions. Moreover, the sole decision invoked by the petitioner as conflicting with the decision below—*Marriott In-Flite Services v. Local 504 Transport Workers*, 557 F.2d 295 (2d Cir. 1977)—is no longer good law in the Second Circuit in light of that court's later *Long Island R. v. Intern. Ass'n of Machinists*, 874 F.2d 901, 910 (2d Cir. 1989) decision. The *certiorari* petition should therefore be denied.

1. (a) In essence, LMRA § 303(b) provides for a federal court damage action by a person "injured in his business or property by reason of any violation of [§ 303] subsection a," and

subsection (a) makes it a violation "for any labor organization to engage in any action or conduct defined as an unfair labor practice in [NLRA § 8] (b)(4)"—*viz.*, in the NLRA secondary boycott provision.

For the purposes of both LMRA § 303, and the related NLRA § 8(b)(4), the term "labor organization" is a defined term:

> The term "labor organization" means any organization of any kind . . . in which *employees* participate and which exists for the purpose . . . of dealing with *employers*. [NLRA § 2(5), 29 U.S.C. § 152(5); emphasis added]

The terms "employee" and "employer" are, in turn, defined as follows in NLRA §§ 2(3) & 2(2), 29 U.S.C. §§ 152(3) & 152(2):

> The term "employee" . . . shall not include any individual employed . . . by one employer subject to the Railway Labor Act . . . or by any other person who is not an *employer* as herein defined.
>
> * * * *
>
> The term "*employer*" . . . *shall not include any State or political subdivision thereof* or any person subject to the Railway Labor Act. [Emphasis added.]

What follows ineluctably from the foregoing, as the Court of Appeals held, is this:

> By the plain, unambiguous language of the LMRA, the definition of "labor organization" excludes an organization of employees of a political subdivision of a state. Because Local 68 represents port pilots employed by the City of Los Angeles, it is an organization of employees of a political subdivision of the State of California and is therefore not a "labor organization," as set forth in 29 U.S.C. § 152(5). Hence, Local 68, as a public sector union, is not subject to liability under 29 U.S.C. § 187 for "secondary boycott" activity. [Pet. App. 7a.]

(b) To put the foregoing another way, LMRA § 303/NLRA § 8(b)(4) prohibit secondary boycott picketing by *NLRA unions* but *not* such picketing by *public sector unions*. As the Court of Appeals recognized, that conclusion is entailed by this Court's conclusion—stated first in *Railroad Trainmen*, *supra*, and reaffirmed in *Burlington Northern*, *supra*,—that the LMRA/NLRA secondary boycott provisions do *not* cover RLA union secondary boycott picketing. That is so because, as we have seen, RLA unions are excluded from the LMRA/NLRA regulatory scheme by the same provisions—NLRA §§ 2(2), 2(3) & 2(5)—that exclude public sector unions.

In *Railroad Trainmen*, which arose out of a state court injunction against an RLA union's picketing, the Court concluded that nothing in federal law prohibits RLA union secondary boycott picketing and that it follows that RLA union "picketing—whether characterized as primary or secondary—must be deemed conduct protected against state proscription." 394 U.S. at 369. In reaching that conclusion, the Court rejected the proposition that RLA union secondary boycott picketing is covered by the prohibitions of NLRA § 8(b)(4):

> Sections 2(2) and (3) of the NLRA, 29 U.S.C. §§ 152(2), (3), expressly exempt from the Act's coverage employees and employers subject to the Railway Labor Act. And when the traditional railway labor organizations act on behalf of employees subject to the Railway Labor Act in a dispute with carriers subject to the Railway Labor Act, the organizations must be deemed, *pro tanto*, exempt from the National Labor Relations Act. See NLRA § 2(5), 29 U.S.C. § 152(5). [394 U.S. at 376-377; footnote omitted]

The *Railway Trainmen* Court noted that in 1947 when LMRA § 303/NLRA § 8(b)(4) were added to the law, the fact that those provisions did *not* cover RLA union secondary boycott activity but only NLRA union secondary boycott activity was expressly

noted, was criticized as "inequitable" by opponents of the legislation and was defended as proper by Senator Taft on the ground that "railway labor has never been covered by the Wagner Act." 394 U.S. 376-377, n.10. As to the 1959 amendments to the LMRA/NLRA secondary boycott provisions, the Court added:

> In 1959, § 8(b)(4) was amended to expand the class of persons protected against secondary pressures. 73 Stat. 542; see *Steelworkers v. NLRA*, 376 U.S. 492, 500-501 (1964). However, the amendment did not expand the scope of "employees" or "labor organizations" whom the Act forbade to engage in such conduct. [394 U.S. at 376-377 n. 10]

In its ultimate terms, *Railway Trainmen* was a preemption case and doubts as to whether federal law permits or prohibits RLA union secondary boycott picketing persisted. In the *Burlington Northern* case, which arose out of a federal court injunction against such picketing, the Court made it plain beyond peradventure that federal law permits RLA union secondary boycott picketing.

The *Burlington Northern* Court noted that it was "conce[ded] . . . that the RLA does not contain an express mandate limiting the scope of self-help available to an [RLA] union once the RLA's major dispute resolution procedures have been exhausted" and then "declin[ed] . . . to find in [the RLA] an implied limit on a union's resort to secondary activity." 481 U.S. 446, 452-453. In so doing, the Court rejected the contention that the LMRA § 303/NLRA § 8(b)(4) secondary boycott provisions provide a basis for treating RLA union secondary boycott picketing as an unfair labor practice and for permitting the federal courts to enjoin such activity. 481 U.S. at 448-449. Echoing *Railroad Trainmen*, the Court pointed out that "it is significant that Congress excluded rail carriers and rail employees from the coverage of the NLRA," citing NLRA

§§ 2(2) & 2(3), and that precisely because § 8(b)(4) does not cover RLA union secondary activity "even the NLRB has no authority to seek an injunction" against RLA union secondary boycott picketing. *Id.*

(c) It is also very much to the point, as the Court of Appeals noted, that consistent with the language of NLRA § 8(b)(4), its legislative history and this Court's *Railroad Trainmen* and *Burlington Northern* decisions,

> the NLRB General Counsel has held that a union that is not a labor organization under 29 U.S.C. § 152(5) cannot violate 29 U.S.C. § 158. *See, e.g., Air Line Pilots Association*, No. 12-CC-1217, 1990 NLRB GCM LEXIS 56 (NLRB Office of General Counsel, Dec. 27, 1990). In *Air Line Pilots*, the General Counsel held that a union comprising Railway Labor Act workers had not violated 29 U.S.C. § 158, though the union had induced secondary boycott activity because the union was not a 29 U.S.C. § 152(5) "labor organization." *See id.* at *9-*10. "[T]he 1959 amendments provide that a labor organization violates [29 U.S.C. § 158(b)(4)(B)], even if the *induced* persons are not . . . employees [under 29 U.S.C. § 152(3) and even if the restrained companies are not . . . employers [under 29 U.S.C. § 152(2)]. But the 1959 amendments did not change the requirement that the offending entity be a labor organization." *Id.* at *9 (emphasis added). [Pet. App. 9a-10a.]

2. Against all this, the petitioner makes two points, but neither advances its position.

First, on the merits, the petitioner argues that "the legislative history of the 1959 amendments to Section 8(b)(4) of the NLRA clearly demonstrates that Congress thought that it was amending the NLRA in a way that would prohibit secondary boycotts by public sector unions." Pet. 9. The short but complete answer is that this Court flatly rejected that understanding of the 1959

amendments and their legislative history in *Railroad Trainmen*, 394 U.S. at 376-377 n.10 (quoted p. 5 *supra*).

Second, petitioner posits a conflict in the Courts of Appeals based on the Second Circuit's *Marriott In-Flite Services*, *supra*, decision permitting an LMRA § 303 damages suit predicated on an RLA union's secondary boycott picketing. But, on the strength of this Court's subsequent *Burlington Northern* decision, the Second Circuit has since repudiated the main premise of *Marriott In-Flite Services* and by so doing has left that decision without present force or effect.

The *Marriott In-Flite Services* Court rejected the union's reliance on *Jacksonville Terminal* on the theory that this Court had held only that state law prohibiting RLA union secondary activity is preempted and that the Court had done so without "decid[ing] whether the activity at stake was 'primary' or 'secondary' or whether it was protected by the RLA." 557 F.2d at 299. *Marriott In-Flite Services* thus disregards the portion of *Jacksonville Terminal* stating that NLRA § 8(b)(4) does not cover RLA union secondary boycott activity as "ambiguous dictum." 557 F.2d at 299.

That was, at best, a tendentious reading of *Jacksonville Terminal* at the time. Be that as it may, after the further elucidation provided by *Burlington Northern*, the Second Circuit has corrected itself by recognizing "that secondary picketing [by RLA unions] is allowed by *Burlington Northern*." *Long Island R.*, *supra*, 874 F.2d at 910. Simply stated, the recognition that *Burlington Northern* holds that RLA union secondary boycott picketing is protected by the RLA (and is not invalidated by NLRA § 8(b)(4)) undermines *Marriott In-Flite Services'* premise and its rationale entirely.[1]

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[1] We would be derelict if we failed to point out that *Marriott In-Flite Services'* reading of the LMRA § 303/NLRA § 8(b)(4) secondary boycott

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

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provisions is not only belied by *Jacksonville Terminal* and *Burlington Northern*, but is plainly wrong on its own terms.

The *Marriott In-Flite Services* Court recognized that the plain language of LMRA § 303/NLRA § 8(b)(4) does *not* cover RLA union secondary boycott activity and then determined to "disregard" the plain statutory language as at variance with the Congressional intent revealed in the 1959 legislative history. 557 F.2d at 297-299. The only such legislative history that the *Marriott In-Flite Services* Court cited is a passage from what that court refers to as "the Senate Report on the 1959 bill." *Id.* at 297.

But the passage in question is in fact from a statement of "Minority Views" on behalf of Senators who "oppose[d] the passage of th[e] bill" being reported. Sen. Rep. No. 187, 86th Cong., 1st Sess. 70(1959), reprinted in NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA Leg. Hist.), vol. 1, p. 466 (1959).

And, there is, in fact, *nothing* in the 1959 legislative history showing a Congressional intent to cover RLA union secondary boycott activity by LMRA § 303/NLRA § 8(b)(4). To the contrary, the sponsors and supporters of the 1959 § 8(b)(4) amendment made it plain that their quite different aim, clearly expressed in the statutory language of their amendment, was to make the existing prohibition on *NLRA union secondary boycott activity* more binding by assuring that those unions could no longer "avoid the existing provisions by inducing individual employees, or workers not defined as employees by the act such as railroad and agricultural workers -- to refuse to handle the products of the person with whom they want the employer to cease doing business." *Labor Board v. Servette*, 377 U.S. 46, 52 n.8 (1964) (quoting Hearings before the Senate Subcommittee on Labor and Public Welfare on § 505 etc., 86th Cong., 1st Sess., p.265 (testimony of Secretary of Labor Mitchell)). *See also, Labor Board v. Fruit Packers*, 377 U.S. 58, 64-68 (1964) (detailing the NLRA § 8(b)(4) amendment legislative history).

Respectfully submitted,

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